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DECEMBER TERM, 1872.

BENJAMIN F. FLANDERS, *Deputy General Agent United States Treasury Department, Plaintiff in Error,*
*vs*
JOHN P. TWEED.

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*In error to the Circuit Court of the United States for the District of Louisiana.*

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### STATEMENT.

The Record shows (p. 1) that Tweed sued Flanders in the circuit court below for damages, for cotton seized and detained by Flanders, "deputy general agent of the Treasury Department of the United States," the cotton itself having been theretofore recovered by Tweed under two writs of sequestration in said court; and, in specifying the items of damage, the petition states that one is for $7,000, "counsel fees, clerks' fees, and marshals' fees" in such sequestration suits.

The verdict, which was in favor of Tweed, for $15,280 48 and interest, gave a detailed specification of the items composing this gross amount, and of these one is for lawyers' fees, $6,000, and another for clerks' and marshals' fees, $1,126 13.

There was judgment accordingly.

The Record also shows a bill of exceptions duly taken upon the trial. These exceptions we submit without argument.

For *error*, we assign, that the verdict includes the two items above specified:

1. That error may be assigned for such miscarriage by the jury, see Arcambell *vs.* Wiseman, 3 Dall., 306, which is recognized, and distinguished, in Jennings *vs.* Brig Perseverance, *ib.*, 326.

2. We submit that it was not competent for Tweed to bring sequestration suits against Flanders for cotton in his possession as an officer of the United States, whether virtually or colorably—on the ground that such cotton was thereby *in custody of the law.*

In the absence of legislation recognizing a difference in dignity between the various sorts of *custody of the law*, such as under writs of *fi. fa.*, *attachment*, *distress*, *revenue seizures*, or the like, it seems that no such difference can be recognized, and, ordinarily, that no officer of the law in one of these departments can deprive an officer under another of them of possession previously acquired, whether such possession be *virtual* or merely *colorable.*

It does not conflict with this doctrine to allow that, after a cause questioning one or the other of these sorts of possession has been *litigated* in a competent court, such possession may be displaced by the final judgment, for this is within the scope of the ordinary functions of the judicial department for terminating controversies. If, however, the above doctrine exists

at all, it must apply to cases of such displacement where warranted only by the order of a judge, or even clerk of a court, upon an *ex parte* application by a party to a suit, during its preliminary stages. Such is the character of the sort of sequestration under consideration. "Orders of sequestration may be issued either by the judge before whom the cause is brought, or by the clerk of the court." (La. Code of Practice, ed. of 1844, § 269.)

Whether possession be virtual or merely colorable, can be known only after the litigation in a cause in which that possession appears, has terminated. No one department or set of officials has a right to treat the possession of another as *colorable only* pending the litigation between them.

The Louisiana Code, *ubi supra*, defines "sequestration [to be] a mandate of the court, ordering the sheriff in certain cases to take in his possession and to keep a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing."

It is said by the courts of that State to be a "stringent" remedy, (2 La. Ann., 961,) and a "rigorous" one, (9th *ib.*, 536,) and they add, in that connection, that it is to be applied only where the statute clearly entitles an applicant to such process, and is not to be extended by implication to cases not contemplated by the lawmaker.

In Twitty *vs.* Clark, (14 La. Ann., 503,) the court said that sequestration could not be applied to displace

the possession of a constable holding under an execution, because the thing was in the custody of the law, and the constable not liable to be treated in so "summary" a manner.

We submit that this is equally true of all officers, State or United States, holding *officially*, as the petition recognizes this defendant to have done; that the possession is one apparently for some purpose of the Government, forbids that the defendant be ousted in the preliminary stages of a suit whose end is to determine the rightfulness of that possession.

In such a case the plaintiff may use all *ordinary* remedies to vindicate his rights, but he is not entitled to one so extraordinary, "summary," "stringent," and "rigorous."

There may be reasons for compelling the officer by injunction to give security that the thing remain in his possession, *in statu quo*, until the suit be ended. There seems to be none for taking it away from him.

We have not been able to find a case in which facts like the above were presented for decision. Those nearest it involved also a collision of jurisdiction between State and Federal authority, as in Harris *vs.* Dennie, (3 Peters, 292.) But it is proper to consider that the answer to process issuing from State courts is, that the thing is in the custody of the United States. As we have already said, in the absence of legislation subordinating one species of custody to another, the same answer seems to be satisfactory wherever like process issues from a Federal tribunal.

GEO. H. WILLIAMS,
*Attorney General.*
S. F. PHILLIPS,
*Solicitor General.*

*Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.* [*January*, 1873.]

# Supreme Court of the United States,

## DECEMBER TERM, 1872.

*Benjamin F. Flanders*

135.] *vs.*

*John P. Tweed.*

**Error to the Circuit Court for the District of Louisiana.**

**T. D. LINCOLN,**

*Of Counsel for Defendant in Error.*

*Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.* [*January*, 1873.]

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### I.

#### STATEMENT OF THE CASE.

The transactions involved in this suit took place in Louisiana in the spring of 1866.

The suit was commenced on the 28th of May, 1866, by Tweed, the defendant in error, who was a citizen of Ohio, against Flanders, who was a citizen of Louisiana, and was at the time a deputy general agent of the Treasury Department.

The petition charged that the said Tweed, on or about the 6th of March, 1866, was the owner of four hundred and ninety-five bales of cotton, then being in the city of New Orleans; that the said Flanders, deputy general agent

of the Treasury Department, unlawfully seized and took said cotton into his possession, and unlawfully detained the same until the 15th of May of said year, when he, the said Tweed, by virtue of two writs of sequestration issued against the said Flanders, obtained possession of said cotton, he, said Tweed, in said suits, expressly reserving therein the right to sue for damages; that during the period from the 6th of April to the 15th of May, while the defendant Flanders unlawfully held said cotton, the value of it declined $30,000; that he was compelled to pay interest to the amount of $164, insurance to the amount of $200, and storage to the amount of $1,000; that by reason of said sequestration suits he was compelled to pay, by way of clerks and marshal fees and counsel fee, the further sum of $7,000; that the said Flanders caused fifty bales of this cotton, while thus held by him, to be sent from the warehouse where it was stored, and rebaled, whereby it was diminished in weight and in value in the further sum of $1,000. And for these damages this suit was brought. Record, p. 1.

On the 7th of February, 1867, the defendant Flanders filed his answer, and admitting that he was a deputy general agent of the Treasury Department, he denied all the other facts contained in the said petition. Record, p. 2.

It will be observed that though Flanders is described as a deputy general agent of the Treasury Department, that is, *descriptio personæ*, he is not sued as such.

On the 3d of February, 1868, Samuel H. Terry, counsel for the United States, appeared in the case to defend Flanders. Record, p. 2.

The case was submitted to the Court, and on the 26th

of February, 1868, judgment was rendered for the plaintiff Tweed, in the sum of $36,976.33. Record, pp. 3, 4.

This judgment was taken to this Court upon error, and there reversed, upon the ground that there was not found in the transcript a stipulation waiving a jury, or any special finding. 9 Wal. 431.

The case went back, and on the 14th February, 1871, the defendant, Flanders, filed his amended and supplemental answer, setting up that during all the time named in the petition he was an officer and agent of the United States of America, to wit, a deputy general agent of the Treasury Department, duly authorized, and that the cotton, before and at the time of the issuance of the writs of sequestration, by which the said cotton was taken from the United States and of the defendant, was so in the possession and custody and control by the official act and authority of the defendant, done and performed as such officer and agent, in the administration of acts of Congress relating to States of the United States in insurrection and rebellion against the lawful government of the United States, or to persons and property in said insurrectionary States, to wit, the act of March 12, 1863, relating to abandoned and captured property, and the act of July 2, 1864, relating to commercial intercourse and to captured and abandoned property, and in virtue and under color of said acts, and in the exercise of his said office and agency; and that the property sequestered by the plaintiff Tweed, at the time it was so sequestered, was by him held as such officer and agent, by authority and under color of the acts of Congress, by reason whereof the same was beyond the lawful reach and effect of said alleged writs of sequestration, and the taking of said property by an officer of the Court under such writs

was an act of lawless and unjustifiable trespass and violence.

The defendant, Flanders, in said amended answer, further averred that all the matters, acts, and omissions of which he was charged in this suit, and the alleged holding of said cotton, and his refusing to yield up and release the same to the plaintiff, Tweed, were then and there acts done by the defendant, not in his private character and capacity, but in the exercise of his said office and agency, and in the official character and capacity of agent and officer, done and performed by virtue and under color and in his administration of the said acts of Congress. Wherefore the Court was then, and in all things and at all times had been, without jurisdiction of the matters complained of in the petition, but that the sole and exclusive jurisdiction thereof was, and always had been, in the Court of Claims; wherefore the defendant prayed judgment for dismissal, etc.

This answer is in issue, under the practice in Louisiana. Sec. 329, Code of Practice, La.

Upon these pleadings and issues, the case went to a trial before a jury. During the trial the plaintiff, Tweed, was examined as to his interest in the cotton, and he testified, in substance, that he did not individually own all the cotton; that the house of Tweed, Andrews & Co., of which he was a partner, owned a half interest, and the house of Scott & Cage owned a fourth, and the firm of Weed & McKee a fourth; that he, individually, owned less than a half interest in the house of Tweed, Andrews & Co.; that these parties furnished the money, and were to be interested in the profits and losses; but that the whole matter was left with him and the title was in him, and these parties were interested in the profits of the transaction only. The de-

fendant also offered proof tending to show that C. A. Weed & Co. had become bankrupt, and had surrendered their property, and that Scott, Cage & Co. had ceased to do business as a partnership, and were insolvent; and proof was given that three-fourths of the cotton, to wit, 372 bales, had been received by the plaintiff in a suit against the defendant.

Upon this evidence the defendant, Flanders, asked for a nonsuit, which was overruled, *to which ruling exceptions were taken.* Record, p. 10.

Flanders then asked a series of charges, of which 5, 6, 7, and 8, respectively, only are reported, presenting thereon the same question, as to Tweed's right to recover, based upon the evidence, so given as to other parties being interested in the said cotton with him. These charges were overruled, and exceptions taken thereto. Record, pp. 10, 11.

The above exceptions, refusing a peremptory nonsuit and overruling charges 5, 6, 7, and 8, are the only exceptions in the record.

The jury returned a verdict for the plaintiff in the sum of $15,280.48.

A motion in arrest of judgment was then made, and two reasons alleged therefor.

1. That the Court had no jurisdiction.

2. That the verdict is invalid and void for misconduct of the jury, they having taken to the jury room with them Tweed's deposition and the entire papers in the cause, some of which had not been offered in evidence upon this trial. Record, p. 12.

A motion was also made for a new trial, for three reasons:

1. That the verdict was contrary to law and the evidence.

2. That the Court erred in the charges and directions given at the request of the plaintiff, and erred in refusing those requested by the defendant, and in the oral charge.

3. That the verdict, except that relating to decline of price, was wholly unsustained by the evidence, and was a mere act of legislation on the part of the jury. Record, p. 13.

The motion in arrest and that for a new trial were both overruled, and judgment was thereupon rendered for plaintiff. Record, p. 14.

To reverse the judgment thus entered, this writ of error is prosecuted.

## I.

### THE CIRCUIT COURT HAD JURISDICTION.

I have set out above what is found in the record, and the questions raised therein are indicated. It is important to bear in mind that the bill of exceptions *shows nothing whatsoever as to the character of the wrongful acts charged against Flanders, or as to the nature of his acts, conduct, or claim; and nothing is in any way raised by the charges, or by any exceptions found in relation thereto.*

*There is nothing anywhere in the record, much less in the bill of exceptions, which shows that the cotton was captured or abandoned property, or property confiscable under the law of July* 17, 1862, *or liable to forfeiture under the law of July* 13, 1861? *There is nothing whatsoever of its character, not even averred in the amended answer of Flanders.*

He does in this answer, indeed, *claim generally*, that he

acted under color of the laws of March 12, 1863, and of July 2, 1864, but how he was thus acting, in New Orleans, on the 6th of March, 1866, does not appear. How then can it be claimed that the Circuit Court of the United States had not jurisdiction of the cause, and that the Court of Claims had such jurisdiction?

The action is one sounding in *tort*. It is for an unlawful seizure, taking and withholding of personal property, to wit, cotton; and by what law has the Court of Claims any jurisdiction of *such* a cause of action?

Neither by the law organizing that court and giving it its jurisdiction, nor by the captured and abandoned law of March 12, 1863, nor that of July 2, 1864, has that Court any power to consider such a question as that here involved. We are not now here examining the sequestration suits, and it matters not, so far as *this* suit is concerned, whether the Court erred in such suits or not. This is an action sounding in tort, and clearly the Court of Claims could take no jurisdiction of it.

The jurisdiction of that Court was, by the act organizing it, confined to *claims against the government, founded upon some law of Congress, or some regulation of an executive department, or upon some contract, express or implied*, made with *the government*. And the law of March 12, 1863, gave this Court further jurisdiction in reference to the proceeds of captured and abandoned property. This is the extent of the jurisdiction of that Court. It can not try a replevin suit, nor any action sounding in tort, or any such controversies between individuals. The suits are all upon claims *against the government*.

The act organizing the Court is styled:

"An act to establish a court for the investigation of claims *against* the United States."

Aside from claims against the United States, and set-offs in such suits, it has no power—no jurisdiction—and can not consider a case between two individuals, like the one now before this Court.

And there is no law to deprive the Circuit Court of the United States of jurisdiction in such a case between parties situated as these are. The act of July 27, 1868 (15 Stat. at Large, 243, 244), clearly admits jurisdiction in such a case. The second section provides that an alien shall not maintain any such action in any court against the United States, or any person for or on account of any act done or omitted to be done by such person as an officer or agent of the United States, in the administration of the acts of Congress of 12th March, 1863, and 2d July, 1864, or in virtue or under color of such acts. It provides that any such agent when sued may plead that the acts were done in administration of such laws, or in virtue or under color thereof, and that *if the plea be sustained by proof*, it shall be a conclusive bar to such suit or action. 15 Stat. at Large, 243, 244.

This admits jurisdiction, even for an alien, but provides a defense, to be proved by such officer or agent. The third section of the act provides:

"That it was the true intent and meaning of the act of March 12, 1863, that the remedy given in case of seizure under said act, by preferring a claim in the Court of Claims, should be exclusive, precluding the owner of any property taken by the agents of the Treasury Department as abandoned or captured property, in virtue or under color of said act, from suit at common law, or any mode of redress whatever, before any court or tribunal other than said

Court of Claims; and in all cases in which suits of trespass, replevin, detinue, or any form of action, may have been brought and are now pending, or shall hereafter be brought against any person as an officer or agent of the United States, in virtue or under color of the act aforesaid, or of the act approved July 2, 1864, entitled, etc., . . . the defendant may and shall plead or allege in bar thereof, that such act was done or omitted to be done by him as an officer or agent of the United States, in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof; and such plea or allegation, *if the fact be sustained by proof*, shall be, and shall be deemed and adjudged in law, a complete and conclusive bar to any such suit or action." 15 Stat. at Large, 244.

Now, this section clearly *admits* the jurisdiction of the Court, and provides a defense which, *if proved*, is a bar.

But in this case the record shows no proof or attempt at proof, no item of proof of the kind, no statement that there was proof *tending* to show any such state of things, no charge in relation to it, and no exception having any bearing whatsoever upon it.

So that no such question is before this Court, and the Circuit Court had unquestioned jurisdiction. It is also to be borne in mind that the defense here provided only applies to the cases where the cotton has been sold, and the proceeds placed in the Treasury, and the party has sought its proceeds in the Court of Claims.

It can not be supposed that Congress intended to leave owners of cotton and other property to the mercy of these subordinate agents of the government, who might hold a little brief authority, and that there was no remedy for their wrongs and outrages simply because committed upon the pretense of acting under color of some one of these laws. The section and the defense named show that it was only in that class of cases where the proceeds of the

cotton had gone into the Treasury, and were there claimed, that the remedy for wrongs in relation thereto was barred. In such a case the law might impose those terms upon the proceeding against the government in the Court of Claims. And it was to prevent suits at the same time against the agents, in which the United States might be bound to defend, that this provision was made.

I pass over the question here, as unimportant in this suit, whether this third section of the act of July 27, 1868, be, or not, an incroachment upon the judicial power, but leave it, as nothing in it can affect these parties upon this record.

## II.

### THERE WAS NO GROUND FOR A NONSUIT.

FIRST. At an early time, this Court decided that the United States Circuit Court had no power to order a peremptory nonsuit.

*Doe, ex dem. Gilmore*, v. *Grymes*, 1 Pet. 471.
*D' Wolf* v. *Raband et al.*, 1 Pet. 497.
*Crane* v. *Lessee of Morris*, 6 Pet. 609.

That is now the settled practice of the Court.

*Silsby* v. *Foote*, 14 How. 222.
*Castle* v. *Ballard*, 23 How. 182, 183.
*Foote* v. *Silsby*, 1 Blatch. C. C. 461.
*Boucicault* v. *Foote*, 5 Blatch. C. C. 90.
*Carr* v. *Gale*, 3 Woodb. & M. 58.
*Thompson* v. *Campbell*, Hemp. C. C. 8

In some states it is, and in some circuits it was, the practice to order a peremptory nonsuit in a proper case; but when so resorted to, it was upon the close of the plaintiff's evidence. It was too late after the defendant had offered evidence. In this case, the nonsuit was not moved until all the evidence on both sides was put before the jury. Record, p. 10. It was then, according to the usual practice in such cases, too late to move for a nonsuit. *Doe, ex dem.* v. *Grymes*, 1 Pet. 472.

The case had then become one in which the parties had a right to appeal to the jury, unless the defendant should take the case from the jury in some of the ways known to the practice for that purpose.

Formerly, that could have been done by a demurrer to the evidence.

But this practice has fallen into disuse. *Suydam* v. *Williamson*, 20 How. 436.

And it required a report of all the evidence, and it admitted not only the truth of all of it, but all inference that might be drawn from it.

Or the defendant might ask the Court to charge the jury that, upon the evidence offered, the plaintiff could not recover. *Hickman* v. *Jones*, 9 Wal. 201.

But such a charge required a case in which there was no evidence for the plaintiff, or one in which, by no possible view of the evidence, could the plaintiff recover.

But there is nothing in this case that would entitle the defendant to such a course.

The asking for a nonsuit upon the whole evidence is, substantially, a demurrer to the evidence, and this record presents none of the elements which authorized such a course.

SECOND. But it may be contended that there was a fact shown in the case, that inevitably put an end to it, and that the defendant had a right to have this declared by the Court, and the case thereby dismissed.

If there was some fact developed in the case, that would defeat the plaintiff's right of action in any and every possible aspect which might be presented, then, after the whole evidence was in on both sides, the matter could be reached by submitting that fact to the jury with a charge that if they found such fact, then that the defendant was entitled to their verdict. Or if the fact was admitted, then there could be no error in the Court directing the jury to find for the defendant.

The record is singularly wanting in anything which might give plausibility to such a course.

THIRD. This motion was based upon the idea that there were other parties jointly interested in the cotton besides Tweed, and that therefore he could not recover in the suit.

The record does not show *all* the evidence upon this point, nor does it purport to show all which the evidence *tended* to prove on this point; or that any fact was admitted or proved upon this subject. But this request for a verdict is based on a portion of the testimony of Mr. Tweed while on the stand, and as this evidence is the ground upon which certain charges are asked, I proceed to consider these charges.

## III.

THERE WAS NO ERROR IN REFUSING THE CHARGES ASKED.

The evidence upon which the nonsuit was asked, and upon which the charges asked were based, is as follows:

"The said plaintiff, to maintain and prove his petition, was himself produced and sworn, and gave his testimony in his own behalf to the jury, and while he was so on the witness stand, giving his testimony, was interrogated as to his ownership and title to the cotton described in the said petition herein, and responded and testified as follows, in response to interrogations then and there propounded to him concerning his said ownership, and his interest in this suit:

*Q.* Did you own all this cotton yourself?

*A.* Not individually; I did not.

*Q.* Who did own it?

*A.* My partners in my business house at Cincinnati; Weed & McKee had an interest here, and Scott, Cage & Co. Who these companies are composed of I can not tell you; *but I had the business management.*

*Q.* How much of an interest did they have in it?

*A.* That would require some little time to figure out. The partnership of my house at home would have to make that out. Some partners had more than others, according to what they represented. I represented Tweed & Andrews, and we had a half interest, Scott & Cage a fourth, and Weed & McKee a fourth, *but I was manager of the whole business.*

*Q.* You have only one-half interest?

*A.* That's all.

*Q.* What interest have you in the firm of Tweed & Andrews?

*A.* At this time less than half and more than one-third.

*Q.* What interest then?

*A.* I think larger than it is now. I don't know exactly what it was then, but it was larger.

*Q.* They were all interested in this contract?

*A.* Yes, sir; and furnished a portion of the money in proportion to their interest.

*Q.* A portion of the loss was theirs?

*A.* I suppose when the thing comes to be settled up it will be found out. The concern is not closed yet.

*Q.* This transaction has never been settled up between the parties to it?

*A.* *They have their contingent interest in the proceedings before this Court.*

*Q.* An interest in this suit?

*A.* Yes, sir.

*Q.* You yourself have only got a quarter interest?

*A.* Something like that.

RE-DIRECT EXAMINATION.

*Q.* You stated that these parties had an interest with you in the result of this enterprise. State what their interest was. Who owned the cotton?

*A.* *I was the entire manager of the whole cotton. The title rested in me. They only had an interest in the adventure.*

BY THE DEFENSE.

*Q.* It was a partnership affair according to their interest in it?

*A.* Yes, sir.

*Q.* They furnished a proportionate amount of money?

*A.* *I say we all had a share in the final result, but the whole management rested with me. They had no advice or control over the business. They had merely an interest in the result.*

*Q.* Was not a partnership entered into and money advanced to carry out this contract?

*A.* Yes, sir.

*Q.* Had you any communication after you got up there (to Shreveport)?

*A.* Yes, sir.

*Q.* How?

*A.* By Mr. McKee.

*Q.* He represented—

*A.* Weed & McKee.

*Q.* Who else?

*A.* Mr. Scott.

*Q.* One of each firm?

*A.* Yes, sir; *but they were not consulted, or did not know of these purchases at the time I made them.* They were up there at the time, *but I had the whole supervision of the matter. The cotton was paid for by me.*

BY THE PLAINTIFF.

*Q. Had anybody a right to control or possess this cotton?*

*A. No one but myself until Mr. Flanders assumed it.*

*Q.* No one but yourself had a right to the control and possession of this cotton. That was the understanding between you and these men when they sold the cotton; and you were to apportion their interest?

*A.* Yes, sir; *that's all—profits or losses.*

That the defendant, by virtue of the record thereof, proved that the said firm of C. A. Weed & Co., of New Orleans, referred to in said testimony, surrendered all their property, as well the property of their firm as of the individual members thereof in proceeding in bankruptcy, under the provisions of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and on the 5th day of May, A. D. 1868, obtained from the District Court of the United States for the District of Louisiana, a discharge from all debts, provable under said act, and that the said C. A. Weed & Co. surrendered and transferred to their assignee in bankruptcy, one E. E. Norton, their one-quarter interest in all of said cotton, as well as their interest in this suit; that the said plaintiff was not the assignee in bankruptcy in said proceedings of C. A. Weed & Co. And further produced evidence tending to show that the said firm of Scott, Cage & Co., referred to in said testimony as having one-quarter interest in said cotton and in this suit, a firm formerly doing business in the city of New Orleans, in the State of Louisiana, had long since ceased to exist as a copartnership, and tending to show that the said firm of Scott, Cage & Co. was insolvent. It was also in proof before the jury that three-fourths of the cotton described in the plaintiff's petition, to-wit, 372 bales, had been received by the plaintiff, in a suit in the court, against the defendant, which record was in evidence."

The above is all that the bill of exceptions shows as to

the evidence or as to what the evidence *tended* to show. The record does not show that there was or was not evidence tending to show more or less than the above; and only a part of the evidence of Tweed, upon the subject of ownership, is reported, and that is reported in the words as given.

It is upon this evidence that the Court was asked to grant a peremptory nonsuit; and this is the evidence upon which the charges hereinafter named were asked, and as the same reasons apply against those charges as against the nonsuit, I have concluded to consider them here.

*These charges asked were as follows, and there was no error in refusing them.*

"5. If the jury believe from the evidence that Tweed, the plaintiff, was not the sole owner of the cotton described in the plaintiff's petition, but that he was only an owner of an undivided joint interest therein, which he held in common with other persons, either C. A. Weed & Co., or Scott, Cage & Co., or other persons, then and in that case all the persons or copartnership owning any interest in said cotton should have been made plaintiffs in the suit with Tweed, the plaintiff, and the jury must find a verdict for the defendant.

"6. If the jury believe from the evidence that other persons than the plaintiff were joint owners with him, and were jointly interested with plaintiff in the venture of buying and sending the cotton, described in the plaintiff's petition, to market, then in that case the right to recover damages growing out of any wrong or injury done to said cotton, or to the value thereof, if it existed at all, was and is fully vested in all the owners of said cotton, and is not susceptible of division, and Tweed, as one of the joint owners thereof, can not maintain an action to recover in his own name all the damage or loss which he alleges was the result of the acts of the defendant, complained of in the petition herein.

"7. If the jury believe from the evidence, that the plaintiff in this case was not the sole owner of the cotton described in the plaintiff's petition, and that he only owned a fractional joint interest therein, and the damages claimed by him in this case would, if recovered, belong in right to him and other persons, in fractional proportions of joint ownership, the plaintiff has failed to establish the material allegations of his petition and can not recover.

"8. If the jury believe from the evidence, that the plaintiff only had a joint fractional interest in the cotton described in plaintiff's petition, and that he held that interest in partnership with his partners in business, in Cincinnati, then and in that case he can not even recover his proportion of any damages claimed in the petition without his partners join with him in this suit, as he can not in his own name recover any demand of the character described in the petition, due to him and his partner as copartners in actual copartnership."

Each of the charges was refused, and exceptions taken thereto.

There are several reasons why the Court could not give these charges.

FIRST. The case being an action sounding in tort, the non-joinder of a plaintiff could only be pleaded in abatement.

1 Chitty on Pl. 66, 441.
Story on Part., sec. 454.
*Leglise* v. *Champante*, 2 Strange, 820.
*Dubois* v. *Glaub*, 52 Penn. St. 243.
*Dejoina* v. *St. Bt. Osceola*, 17 La. Ann. 281.
*Wheelwright* v. *Depeyster*, 1 Johns. 486.
*Agnew* v. *Johnson*, 5 Harris, 378.
*Scott* v. *Goodwin*, 1 Bos. & Pul. 75.
*Dockway* v. *Dickinson*, Skinner, 640.
*Bloxam* v. *Hubbard*, 5 East, 420.

It could not be raised by plea in abatement, after a plea in bar had been filed.

*Gardner* v. *Clarke*, 6 How. Pr. 429.
*Keller* v. *Miller*, 17 Ind. 207.

This seems to be the rule in Louisiana. Thus, in *Dejoina* v. *The Steamboat Osceola*, the Court say:

"The capacity of the plaintiff was not excepted to in *limine litis*, and it is now too late to raise the objection." 17 La. Ann. 281.

Nor could this fact be pleaded with the general issue.

*Shepherd* v. *Graves*, 14 How. 509.
*Sweet* v. *Tuttle*, 10 How. Pr. 41.
*Gardner* v. *Clarke*, 6 How. Pr. 449.

Now, there is nowhere in this record any such plea or answer. It is not found in the original answer, filed February 7, 1867 (Record, p. 2); nor in the amended answer, filed February 14, 1871 (Record, pp. 5, 6).

No allusion to any such defense is anywhere found in the pleadings, or anywhere in the record, except in the above testimony.

Clearly, it could not be taken advantage of then, if it were a defense that could at any time be available.

SECOND. But it was not a defense, at any time available, for several reasons.

1. Tweed having entire control and management of this business, having possession and control of the property, *and the title being in him*, he was the proper party to bring

the suit, though others were interested in the profits of the adventure, or in the property with him.

*Lucas* v. *De la Cour*, 1 M. & S. 251, 252.
*Cathay* v. *Furnell*, 10 Barn. & C. 672.
*Young* v. *Hunter*, 4 Taunt. 583.
*Wilson* v. *Wallace*, 8 Serg. & R. 55.

Where one party is given the control of a business or adventure, is permitted to act in it as though it was his, to buy and take title in his own name, though he may sue in his own name, and those interested with him will be bound thereby, (*Lucas* v. *De la Cour*, 1 M. & S. 251, 252,) he not only holds the legal title, and may therefore sue to protect it, but parties dealing with him may treat him as the principal, and may set off claims against him.

*Ross* v. *Deary*, 2 Esp. 469.
*Lloyd* v. *Archibalde*, 2 Taunt. 327.

2. So far as these transactions in the purchase of this cotton were concerned, the other parties interested were dormant partners, and it is never necessary to join such a partner.

*Law* v. *Cross*, 1 Black, 537.
*Lloyd* v. *Hichbowle*, 2 Lamb, 327.
*Keane* v. *Fisher et al.*, 9 La. Ann. 74.
*Lucas* v. *De la Cour*, 1 M. & S. 250, 251.
*Wilson* v. *Wallace*, 8 Serg. & R. 55.
*Clarkson* v. *Carter*, 3 Cow. 85.
*Skinner* v. *Stocks*, 4 Barn. & Ald. 437.
*Cathay* v. *Furnell*, 10 Barn. & C. 672.
*Page* v. *Brant*, 18 Ill. 38.

*Jackson* v. *Alexander*, 8 Texas, 112.
*Waite* v. *Dodge*, 34 Vt. 183.
*Rogers* v. *Kichline*, 36 Penn. 296.

Indeed, it has been held improper to do so in some cases.

*Ross* v. *Decix*, 2 Esp. 468.
*Leveck* v. *Shaftoe*, 2 Esp. 469.
*Wilson* v. *De la Cour*, 1 M. & S. 250, 251.
*Young* v. *Hunter*, 4 Taunt. 183.
*Law* v. *Cross*, 1 Black, 537.

The liquidating partner may also sue in his own name for claims due the firm, though the other partners are alive. *White* v. *Jones*, 14 La. Ann. 681.

"The suit is instituted by the liquidating partner in his own name; and an exception was filed by defendant to his right to proceed in this form. The exception was properly overruled. The petition sets forth the fact of the claim being one arising out of the business of plaintiff's late firm; and the defendant is deprived of no right which he could have exercised had the suit been brought in the name of all the partners." 14 La. Ann. 681.

3. Tweed having entire control and possession of the property, and sole management of the business, could bring suit on that ground alone, against a wrong-doer.

*Knapp* v. *Winchester*, 11 Vt. 355.
*Hoyt* v. *Gelston*, 13 Johns. 151.
*Harker* v. *Birkbeck*, 3 Burr. 1563.
*Graham* v. *Peat*, 1 East, 246.
*Cary* v. *Holt*, 2 Strange, 1235.

Naked possession, unaccompanied with any title, is enough for that.

2 Starkie on Ev. 837.
2 Greenleaf's Ev. 522, sec. 637.
2 Hilliard on Torts, 213, sec. 11.
*Webb* v. *Fox*, 7 Term, 396.
*Knapp* v. *Winchester*, 11 Vt. 352.
*Bartlett* v. *Hoyt*, 9 Foster, 317.

Now, the evidence reported clearly brings Tweed within each and all these positions. He was in Louisiana purchasing this cotton in his own name. He took the title to himself—the possession and control; and the other parties were not known in it, and were only interested in the profits—in the result. This is clearly shown in the record, so far as there is anything in the record upon the subject.

Thus he says:

"I was manager of the whole business." Record, p. 8.

Speaking of those interested with him, he says:

"They have their contingent interest in the proceedings before this court." Record, p. 8.

Again, he says:

"I was the entire manager of the whole cotton; *the title rested in me; they only had an interest in the adventure.*" Record, p. 9.

Still again:

"I say we all had a share in the final result, but the whole management rested with me. *They had no advice*

*or control over the business; they had merely an interest in the result.*" Record, p. 9.

Again:

"They were not consulted, or did not know of these purchases at the time I made them. They were up there at the time, but I had the whole supervision of the matter. The cotton was paid for by me." Record, p. 9.

Still again:

"*Q.* Had anybody a right to possess or control this cotton?

*A.* No one but myself, until Mr. Flanders assumed it.

*Q.* No one but yourself had a right to the control and possession of this cotton. That was the understanding between you and these men, when they sold the cotton, *and you were to apportion their interest?*

*A.* Yes, sir; that is all—profits or losses."

Now, here it is. Tweed was left with the sole management of the business, bought the cotton without their advice or knowledge, took the title on himself, paid for the cotton, and was the only party known in the purchase. His partners were not known and were simply interested in the profits.

It is difficult to see upon the common principles of pleading how this should be otherwise. Here is the firm of Tweed, Andrews & Co., of Cincinnati, composed of several persons, of whom Tweed is one. Then there are the two distinct firms of Scott, Cage & Co., and Weed & McKee. They form no general partnership, have no common name, but say to Tweed go and buy the cotton in your own name, according to your own judgment, and manage the business yourself. We will furnish each our

share of the money and receive our share of the profits, and bear our share of the losses. He proceeds solely in his name, and takes title to himself. Now, in a suit at law for an injury to the property, he certainly could sue alone, and might be so sued.

The case is a clear one, where he was the party entitled to sue for the whole damage, and where those interested with him were bound by his acts. In the language of Lord Ellenborough, in *Lucas et al.* v. *De la Cour*, 1 M. & S. 250, 251.

"If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made."

In the case of *Keane* v. *Fisher & Co.*, 9 La. Ann. 74, the Court say:

"It appears that one Sierra had a joint interest with Keane in certain sugar adventures, of which this was one. This fact appeared at the trial from the testimony of a witness. But as it also appeared that the business was done wholly in Keane's name, Sierra's interest being dormant. We think the Court did not err in telling the jury the plaintiff might recover in his own name."

To the same effect is the opinion of this Court in the case of *Law* v. *Cross*, 1 Black, 537, thus:

"Cross was a member of the mercantile firm of Cross, Hobson & Co., doing business in Valparaiso. The same firm has a house also in San Francisco. Through these houses much of the correspondence necessary to the transaction of the business was carried on. That Cross was a member of each of those firms, was but an accident in the case, and would not necessarily make them parties to the contract, more than if any other individual or firm had

been his agents; *and even if Cross had agreed to make them equal sharers in the profits arising from the contract, they did not thereby become parties to it. The firm had no contract with Law on which they could sustain a suit or be liable to him.*"

These charges could not have been given. In the aspect of the case, they were not true. They were too broad. The simple facts set out in them were not sufficient to defeat the action in whole or in part. They left out of view, that the possession, management, and legal title of the cotton was in Tweed, and that the other parties were only interested on the result—in the profits and losses. They leave out of view all distinction between the legal and the equitable title, and that the persons interested, were silent partners not known to the world as such, and that a wrongdoer could not defeat the recovery in whole or in part, by the proof that other persons were interested in the adventure or in the profits to be derived from the purchase and sale of the cotton, the whole of which was left by them, exclusively in the hands of Tweed.

The Court will bear in mind that there is nothing in the record showing what other proof was given, or what it tended to show upon this point, and we are left wholly to that part of the testimony of Tweed reported, and to the presumptions of law in such a case. One of these presumptions is, that where nothing appears in the record to the contrary, that the evidence was such as to justify the charge of the Court.

*State* v. *Hopkins*, 5 R. I. 59.
*Day* v. *Roguet*, 14 Minn. 273.
*Parker* v. *Jones*, 1 Allen, 272.
*Murray* v. *Fry*, 6 Ind. 373.
*Parmenter* v. *Coburn*, 6 Gray, 510.

Thus, in *State* v. *Hopkins*, 5 R. I. 59, the Court say:

"If, in application to such a case, the charge could have been correct in any supposable state of the evidence, we are bound, in all fairness, to presume that it was so."

In *Murray* v. *Fry*, 6 Ind. 373:

"If, upon any probable state of facts, the instructions complained of would be correct, the existence of such facts will be presumed."

In *Pierson* v. *Birney*, 15 Texas, 273, the Court say:

"Everything must be presumed in favor of the judgment which is not concluded by the record."

Such presumptions are controlling, and are specially necessary in a case situated as this was, as will appear when the ground upon which the charges were refused is examined.

The judge has thus given his reason for refusing the charges. He says:

"I refused it on the ground that the well settled principle of law with regard to such transactions was that where two, three, or more persons join together in a certain business, as in this case, to buy cotton, and where they all put their affairs into the hands of one person, and none of the partners are to be known therein to the community, that purchaser has the right to purchase, has the right to make a contract, has the right to sue on such contract, and may be sued on such contract: and it is not necessary to make other person a party to such suit. Therefore I refused the 5th instruction." Record, p. 11.

Now, the testimony of Tweed reported shows this state of things, and if it were necessary, in order to sustain the judgment of the Court below, this Court would pre-

sume still more distinct and clear evidence to show what is here referred to by the judge—showing, in other words, that the other parties were *silent* or dormant partners of Tweed.

*We did not take the bill of exceptions, and are not responsible for it*, and are therefore entitled to these presumptions in favor of the legal correctness of the proceedings of the Court below.

The record does not exclude this idea of the judge below, but substantially shows it.

The same presumptions prevail where the whole charge is not given, provided other parts of the charge might so qualify the part complained of as to free it from error.

*Henry* v. *Norse*, 54 Maine, 259.
*Miller* v. *State*, 2 Kan. 182.

Thus in *Henry* v. *The State*, 54 Maine, 259, the Court say:

"Where only a portion of the instructions to the jury is reported, it will be presumed that the presiding judge gave all other proper instructions."

## IV.

### THERE WAS NO GROUND TO ARREST THE JUDGMENT.

After the verdict the defendant filed a motion in arrest of judgment, and gave therein two reasons for such motion.

1. That the Court had no jurisdiction of such a cause.
2. That the jury took to their rooms all the papers of the

case, and among them a deposition of Tweed, previously taken and among the papers, but not used on the trial.

There is an affidavit of the marshal that the jury took all these papers and the New Orleans Price Current, from March 10th to May 15th. But it does not appear that any objection was made thereto, or that the Price Current or deposition were not in evidence, or that any of these papers were used by the jury.

Whether this was irregular or not does not appear. But if it were so, it is no ground for arrest of judgment; for a motion in arrest of judgment must be decided *upon the record*, and can not rest upon facts of this kind thus shown.

*Carter* v. *Bennett*, 15 How. 356.
*The United States* v. *Hammond*, 1 Cr. C. C. 21.

This matter clearly could not be alleged in arrest of judgment. If it could be taken advantage of at all, it would be upon the motion for a new trial.

As to the want of jurisdiction, that has been fully considered.

## V.

OVERRULING THE MOTION FOR NEW TRIAL NO GROUND OF ERROR.

*First.* The overruling or granting a new trial is a mere matter of discretion in the Court below, and can not be alleged as ground of reversal, without express statutory provision therefor.

*Freeborn* v. *Smith*, 2 Wal. S. C. 176.
*Chambers* v. *Campbell*, 15 Conn. 430.

*Blunt's Lessee* v. *Smith*, 7 Wheat. 272.
*United States* v. *Buford*, 3 Pet. 32.
*Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 598.

Three reasons are given in this motion:

1. That verdict is against the law and the evidence.

2. That the Court erred in the charges given and refused.

3. That there was no evidence to sustain any portion of the verdict, except that as to decline of price; all the rest of it being mere legislation of the jury.

No exception was taken to the overruling the motion. The record does not show all the evidence before the Court, so that the Court could not examine it, if it was in accordance with the practice of this Court. Such a motion necessarily depends upon all the evidence and the general conduct and the action of the jury. *Bright, Ex'r*, v. *Eynon*, 1 Burr. 395. There is no means by which the whole evidence could come before this Court for their action in any such case.

*Graham* v. *Bayne*, 18 How. 62.
*Guild* v. *Frenton*, 18 How. 135.
*Campbell* v. *Boyreau*, 21 How. 226.

A motion for new trial at common law rests in the discretion of the Court conducting the trial, and the overruling it upon questions relating to the evidence, is not the ground of error, and such is the well settled practice of this Court.

*Freeborn* v. *Smith*, 2 Wal. S. C. 176.
*Chambers* v. *Campbell*, 15 Conn. 430.
*White* v. *Trountz*, 5 Conn. 188.
*Bright, Ex'r*, v. *Eynon*, 1 Burr. 397.

Nor can a court of error consider the reasons assigned for a new trial, unless they are found in the bill of exceptions, which is not the case here. *Chambers* v. *Campbell*, 15 Conn. 430. The reason of this is thus stated in the case last named:

"The defendants now bring their writ of error for the purpose of having the question of law, stated in their motion for a new trial, reviewed. It is not claimed that there is any error in the judgment below, unless it appears upon this motion; and the question is, whether the matters set forth in the motion for a new trial can be reviewed upon writ of error. It is claimed that the motion may be treated as a bill of exceptions. But the object and design of the two instruments are very different; that of the former is to enable the Court, *before final judgment*, to correct any error that may have occurred upon the trial; that of the latter, to place upon the record certain matters, which would not otherwise appear, to be examined *after final judgment*, upon writ of error.

"The application in the former case is generally addressed to the discretion of the Court; and a new trial may be granted or denied, according to what, under all the circumstances, may be considered the requirements of justice. And when granted, it is sometimes done upon terms prescribed by the Court. But upon writ of error no discretion can be exercised. The only question is, whether the proceedings have been according to law, and judgment must be affirmed or reversed accordingly." 15 Conn. 430.

It is a singular fact in reference to the conduct of the jury in taking with them Tweed's deposition and the New Orleans Price Current, alleged as the ground in arrest of judgment, that it is not given or alluded to as a ground for a new trial, which makes it quite clear that there could have been nothing to the prejudice of the defendant below.

SECOND. It is alleged that there was no evidence to sustain any of the items found by the jury, but that relating

to the fall of price. But the record shows nothing of the kind, and it is hardly possible that such should have been the case, for otherwise the Court would have set aside the verdict. This is evidently a mere flourish to round off the reason assigned, and is a sort of fling at the jury.

The record does not show when it was that Tweed got possession of the three hundred and seventy-two bales. In fact, it was not until the 20th of April, and after a long struggle, the same having been once delivered him and afterwards reseized because Tweed would not abandon his claim to the 123 bales. The cotton was all the time rapidly falling in price, as the defendant and even the Secretary of the Treasury knew. Printed Record, p. 29.

The damages allowed are the necessary result of the seizure and detention.

*First.* As to the reduced value. See:

*Rowley* v. *Gibbs*, 14 Johns. 386.
*Suydam* v. *Jenkins*, 3 Sandf. (S. C.) 644.
*Young* v. *Willet*, 8 Bosw. 492.
*Woodham* v. *Gelston*, 1 Johns. 137.
*Gordon* v. *Jenny*, 16 Mass. 170.
*Cummings* v. *Spruance*, 4 How. 320, 321.
*Haldeman* v. *Beckwith*, 4 McLean, 397–399.
*Dubois* v. *Glaub*, 52 Penn. St. 238.

*Second.* So, too, as to storage and insurance. This item is always allowed, and there would seem to be no fair objection to it. While held by the defendant it was on storage, and this storage the plaintiff had to pay to get the cotton; the insurance also accrued for the risk during the

time the cotton was so wrongfully held. *Hall* v. *Warren*, 2 McLean, 340.

*Third.* As to counsel fees, etc. See:

*Hall* v. *Warren*, 2 McLean, 340.
*Barnett* v. *Read*, 51 Penn. 191.
*Dunning* v. *Humphreys & Clark*, 24 Wend. 31.
*The Appollon*, 9 Wheat 378.
*Offut* v. *Edwards*, 9 Rob. (La.) 94.
*Littlejohn* v. *Willcox*, 2 La. Ann. 620.
*Penny* v. *Taylor*, 5 La. Ann. 714.
*Phelps* v. *Coggeshall*, 13 Ann. 441.
*Dickinsen* v. *Maynard*, 20 La. Ann. 67.
*Whipple* v. *Cumb, Man. Co.*, 2 Story, 665-671.
*Hack* v. *Neil*, 22 Texas, 253.
*C. C. & C. R. R. Co.* v. *Bartram*, 11 Ohio St. 457.
*Jones* v. *Doles*, 3 La. Ann. 589.
*Norton* v. *Cammack*, 10 La. Ann. 10, 11.
*Gray* v. *Lowe*, 11 La. Ann. 392.
*Accessory Tr. Co.* v. *McCarren*, 13 La. Ann. 214, 215.
*Phillips* v. *Bonham*, 16 La. Ann. 387.

I know that at common law, in actions sounding in tort, where there is no malice, the authorities do not agree as to counsel fees *in the suit being prosecuted*, to be recovered as a part of the damages in *that* suit. Possibly the better rule in such a case is against such recovery, though it will be found that there are very many authorities to favor these damages. See cases cited above. One reason why these damages are not allowed in such cases is, that the damages must be estimated as of the time when the suit was commenced; and as the counsel fees have not then accrued, and must necessarily be very uncertain, they are rejected. *Feese* v. *Huntington*, 23 How. 8, 9.

In patent cases, the Court may enter judgment for treble damages, and for this reason these fees should not be allowed by the jury.

But it will be noted that the counsel fees allowed in this case are not for fees in this suit, but for counsel fees in the two suits of sequestration previously decided, and actually accrued and determined.

In such cases, these fees, and the costs of such previous suit paid by the plaintiff, are recoverable at common law, as compensatory damages.

*Hall* v. *Warren*, 2 McLean, 340.
*Seay* v. *Greenwood*, 21 Ala. 476.
*Ferguson* v. *Barber*, 24 Ala. 406.
*Roberts* v. *Heim*, 27 Ala. 683.
*Dunning* v. *Humphrey & Clark*, 24 Wend. 31.
*Offut* v. *Edwards*, 9 Rob. 94.
*Littlejohn* v. *Willcox*, 2 La. Ann. 620.
*Barnett* v. *Read*, 51 Penn. 191.

Those fees were the natural, inevitable, and direct consequence of this illegal detention. They are recoverable, even at common law, upon the general principle which regulates the recovery of such damages as the natural and necessary consequence of the unlawful act.

In the case of *Barnett* v. *Read*, 51 Penn. St. 191, the case last named, the presiding justice charged the jury, among other things, as follows:

"Were the malice only such as results from a groundless act, and there is no actual malice or design to injure, the rule is compensatory damages; but where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages; that is, damages to punish the defendant for his fraud and malice. Compensatory dam-

ages are such as indemnify the plaintiff, including actual loss or injury to property, loss of time and necessary expenses, counsel fees, and any other actual loss plaintiff suffered."

The Supreme Court, STRONG, J., giving the opinion, says:

"The instruction given as to the measure of damages, we regard as unexceptional."

The case of *Hall* v. *Warren et al.*, tried before Judge McLEAN in 1840, involves the principles of this in all its particulars as to the damages. Hall had imported a lot of goods, which Warren, the surveyor of the port of Cincinnati, with the defendants called in to aid him in such service, had seized, for the reason that they had been imported contrary to the laws of the United States, and were therefore forfeited. A suit for the forfeiture of said goods under said seizure had been tried before the District Court of the United States, and decided against Warren, without certificate of probable cause, whereupon Hall sued Warren and those assisting in the seizure in an action of trespass. He pleaded the general issue, and gave notice thereunder of proof that the goods were brought from foreign parts to the defendants unknown, and his suspicion that the "goods had been unladed and delivered in the vessel in which they had been brought to the port of Cincinnati, without any permit or licenses from the collector or any of the competent officers of the customs. And that said goods did not correspond with the entry thereof at the custom-house, but were entered at a sum less than the actual costs thereof, with design to evade the duties, etc. And that the said Warren, calling to his assistance the other defendants,

who were officers of the police, etc., seized the goods and removed them, as he had a right to do," etc.

On the trial of the case, proof was given and admitted, to rebut malice, of extracts from among many letters to the Secretary of the Treasury purporting to have been written at Philadelphia, apprising him of contemplated frauds upon the revenue, and particularly informing him that certain houses at Leeds had made arrangements to import goods free of entry, and suggesting that the importation had been made by said house to Cincinnati, etc. And defendant proved that he had been warned to look for such importations to the plaintiff's house.

The Court, among other things, charged the jury as to compensatory damages (for as to all other there was no fair pretense):

"That the plaintiff is entitled to damages, which shall compensate him for the injury he received, by reason of the trespass, is clear.

"In ascertaining the amount of the damages the Court instructed the jury that they should take into their consideration the depreciation of the goods, the insurance on them, store rent, (having had to pay rent and insurance,) also, clerk hire, under permanent agreements; the expense of defending the goods in the proceedings before the District Court; and also in prosecuting this suit for damages; together with expenses paid by him in drayage, etc., on the return of the goods. That no damages could be recovered by the plaintiff, except those shown to have been incurred, prior to the commencement of the suit."

This goes beyond the claim of damages in the case before the Court, for nothing was allowed for fees or expenses in this case.

The case, in another aspect, was remarkably like that before the Court, for the defendant, Warren, set up that

the goods seized belonged to a certain firm of which the plaintiff was one of the partners, and insisted upon that as a defense, the action having been brought in the name of the plaintiff, Hall, alone; but the Court held:

"That having possession of the goods, and exercising acts of ownership over them, the plaintiff might well sue in his own name." 2 McLean, 337.

Where property is wrongfully withheld from the owner, and he is compelled to resort to legal proceedings to obtain it, the counsel fees are as legitimate part of his damages as anything else, and in that class of cases such is the result of the authorities.

In the civil law such damages are allowed in the suit being prosecuted.

*Stimson* v. *The Railroads*, 1 Wall. Jr. 167.
*C. C. & C. R. R. Co.* v. *Bartram*, 11 Ohio St. 457.
*The Apollon*, 9 Wheat. 378.
*Day* v. *Woodworth et al.*, 13 How. 371, 372.
*Offut* v. *Edwards*, 9 Rob. (La.) 94.
*Littlejohn* v. *Wilcox*, 2 La. Ann. 620.
*Jones* v. *Doles*, 3 La. Ann. 588.
*Penny* v. *Taylor*, 5 La. Ann. 714.
*Norton* v. *Cammack*, 10 La. Ann. 10, 11.
*Gray* v. *Lowe*, 11 La. Ann. 392.
*Accessary Tr. Co.* v. *McCarren*, 13 La. Ann. 214, 215.
*Phelps* v. *Coggeshall*, 13 La. Ann. 441.
*Phillips* v. *Bonham*, 16 La. Ann. 387.
*Dickinson* v. *Maynard*, 20 La. Ann. 67.

This was a transaction occurring in Louisiana, where the civil law prevails; and it is well settled in that state that such damages are allowable in this class of cases. See cases last cited. Several of these Louisiana cases are

precisely like the one under consideration in reference to this item.

It being a Louisiana transaction, the laws of that state, as settled by the highest courts thereof, are the rule of decision in this court.

*Green* v. *Lessee of Neal*, 6 Pet. 297, 298.
*Elmendorf* v. *Taylor*, 10 Wheat. 159.
*Swift* v. *Tyson*, 16 Pet. 18, 19.

It is a rule of damages, fixed by the general law of Louisiana by repeated decisions of the court of last resort in that state, a rule of law of long standing, and applicable to an act done in that state. Clearly this rule of Louisiana law governs this case in relation to this item.

This question, however, involves but this one item, and does not involve the whole judgment; and if there is error in the judgment in this particular, the judgment would be affirmed as to the other items, and reversed as to this, or a reversal would be ordered unless a *remittitur* of this item was entered. It is a distinct and definite amount, and can be remitted without affecting the balance of the judgment. But as there was no charge asked in relation to this fee, and no exception in any way relating to it, nothing in the bill of exceptions relating to it, I do not see how this Court can consider it.

The damages in this case, upon the first trial, appear by the record to have been $36,976.33, whereas in this case they are but $15,280.48. I am informed that this lesser sum was found by the jury under the charge—the jury taking into view that Flanders might have held the property a reasonable time for inquiry as to its character, and that they only allowed the reduced price from and after that time.

## VI.

THE DIRECTIONS OF THE SECRETARY OF THE TREASURY NO DEFENSE.

There appears in the printed record, p. 5, the certificate of the judge trying the case, that the defendant had acted under the direction of the Secretary of the Treasury. This certificate was filed May 13, 1868. It was some three months after the judgment rendered, at the former trial, and two months after a writ of error was sued out, upon which the judgment was reversed in this Court. Printed Record, pp. 34, 35. The object of that certificate was to bring Flanders under the 8th section of the act of July 28, 1866. This act authorized the Secretary of the Treasury to employ counsel to defend and to bring the judgment under the 12th section of the act of March 3, 1863, amended by the act of July 28, 1866, so that it might be paid out of the proceeds of leased lands and the sale of abandoned and captured property. 14 Stat. at Large, 329, 330.

Whether this certificate can in any way be considered in the case, as it is now presented, is perhaps immaterial to the defendant in error. It constitutes no defense that the party acted under the direction of the Secretary of the Treasury. The statute does not so provide; nor does that of July 27, 1868, make such directions a defense, or allude to any such thing. And upon general principles, and laws relating to the subject, the Secretary of the Treasury had no authority to direct a seizure or retention of private property.

*Lenning* v. *Maxwell*, 3 Bl. C. C. 126, 127.
*Mundell* v. *Maxwell*, 3 Bl. C. C. 365.

It is so determined in reference to the directions of the Secretary to collectors of the revenue. They are still liable for unlawful acts, though they acted in good faith, under the directions of the Secretary of the Treasury, and though they have paid the money into the treasury. See cases cited last above.

In the case of *Britton* v. *Butler*, the defendant was sued for the proceeds of two drafts, drawn by a person in Vicksburg upon a house in New Orleans, and collected by General Butler during the time of martial law at New Orleans. He pleaded the condition of martial law; that during such time a person was found furtively attempting to get through the picket lines, surrounding New Orleans, with these drafts upon him; that they were taken from him as forfeited under the act of July 13, 1861; that they were collected and the proceeds paid into the treasury, and that he, Butler, had settled his account therewith; that in all this matter he acted as major-general, in obedience to orders of the President. It was held that it was no defense that he had acted under the direction of the President. The Court say:

"The fact that he received them as major-general and in obedience to the orders of the President, and paid them into the treasury, and that such payment has been approved by the President, can not vary his liability for them to the plaintiff, if he would be liable for them in case no such fact existed, on evidence to be adduced by the plaintiff under his declaration." 9 Bl. C. C. 465.

Similar decisions were made by JJ. NELSON and BETTS in relation to the directions given by the Secretary of the Treasury, as to duties collected in the cases above cited.

And it has always been held that such officers were liable for their illegal acts done in the execution of their office.

*McLean* v. *The United States*, 6 Pet. 426.
*Tracy* v. *Swartwout*, 10 Pet. 95.
*Elliott* v. *Swartwout*, 10 Pet. 157.
*United States* v. *Kendall*, 5 Cr. 276.
*Johnson* v. *The United States*, 5 Mar. 441.
*Slocum* v. *Mayberry*, 2 Wheat. 12.

These special treasury agents were mere ministerial officers. They had no power except to collect and receive abandoned and captured property. They had no authority or right to take any other, even while the armies were in actual occupation, and while acting under the rules and regulations of the Secretary of the Treasury, approved by the President. At the time of these transactions, the armies had been disbanded. The Confederate armies west of the Mississippi had long before surrendered upon promise of protection to their property. The restriction upon commercial intercourse, and the rules and regulations for the collection of abandoned and captured property had been vacated and the whole system abolished, and neither Flanders nor the Secretary of the Treasury had any right whatsoever to take or retain unlawfully the property of the defendant in error. Surely, without something in the bill of exceptions, to show what the wrongful acts were, this Court can not reverse. A collector was often troubled to know whether imported goods were subject to one duty or another, and had in the first instance to decide one way or the other. And it is well settled, that if he in good faith collected more than was due, under the direct orders of the Secretary of the Treasury, and paid the same into the treasury, he was personally liable therefor. See the cases last above cited.

A sheriff has process requiring him to take A. into custody. He arrests B., believing him to be A. He is liable for false imprisonment. He has an attachment against the property of A. He attaches B.'s in the possession of A., believing it to be A.'s. He is personally liable. The officer is a mere trespasser in such a case. And can it be claimed that these treasury agents had an unlimited right to take any man's property and hold it, or that the Secretary of the Treasury had this right in March, 1866? Clearly not.

*Walcot* v. *Pomeroy*, 2 Pick. 122.
*Jamison* v. *Hendricks*, 2 Black, 95.
*Commonwealth* v. *Kennard*, 8 Pick. 135.

I would again call the attention of the Court to the fact, that though in the petition filed in this suit, Flanders is described as Deputy General Agent of the Treasury Department, that he is not sued as such. This is but *descriptio personæ*—does not purport to be more. There is nothing in the bill of exceptions showing that he was acting, or claimed to be, under the law, for collecting captured and abandoned property.

I would further say that the fact that the Secretary of the Treasury may have directed the acts done, forms but slight excuse for Flanders. Whatever the Secretary did, was upon information received from Flanders. He could know nothing of the matter himself. As the proceeding was against Flanders for a wrongful act, and as judgment went against him therefor, as he has set out nothing in the record showing the nature of his acts and conduct, and raised no questions in it relating to the merits by any respect to charge, or any exception, the case is one where

the presumption in favor of the correctness of the judgment below must prevail. No merits were pleaded as set out in the record, simply because there were none; and the effort was therefore to defeat the action upon technical grounds—not touching the merits. The case was one in which a gross outrage was committed under pretense of legal authority, upon an upright merchant, and he has recovered but a small portion of the damage he actually suffered. His former judgment was $36,976.33, whereas this is but $15,280.48. Printed Record, p. 5.

The idea now set up that these treasury agents can not be sued, because they *claimed* to be acting under color of law, would leave every one at their mercy. Such a doctrine, in the language of Mr. Justice STORY, in *Johnson* v. *The United States:*

"Would lead to the most alarming and mischievous consequences, and unsettle some of the best established principles of the law of agency." 5 Mas. 441.

In the case of *Irving* v. *Wilson*, Lord Kenyon, C. J., said:

"The revenue laws ought not to be made the means of oppressing the subject." 4 T. R. 486.

This is quoted with approbation by this Court, in *Elliott* v. *Swartout*, 10 Pet. 156.

Speaking of the Secretary of the Treasury and those acting under him, in *Tracey* v. *Swartout*, this Court say:

"It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress." 10 Pet. 95.

These expressions are made in relation to collectors, who often have most difficult and doubtful questions before them as to the amount of tax to which particular goods are liable.

But the treasury agents in question had no discretion. They were to receive abandoned and captured property.

Abandoned property was specially described in the act of July 2, 1864, in language so plain that no one could be in any error about it. 13 Stat. at Large, 376.

And both abandoned and captured property were so clearly described in the rules and regulations that no one could mistake it. See brief in No. 136, pp.

Flanders, in his answer, claims to have been acting under color of these laws. If he was, it would not authorize him to seize property that was never abandoned or captured.

But he was not so acting. The whole system relating to abandoned and captured property was then done away with, and there is no showing in this record that he was so acting.

The record does not show how he was acting—what was the nature of the wrongful acts proven; and there is no question raised in relation thereto. So that the Court can not consider any such question.

Upon this record, to reverse, the Court must hold that simply because a defendant was a deputy special agent of the Treasury Department, and acted under the direction of the Secretary of the Treasury, and *claimed* to act under color of these laws, that he was secure against suits by individuals whose property he had unlawfully seized and withheld. There is no statutory law to this effect, and it

is evident that a free people could not long exist under any such rules.

The plaintiff in error, in drawing up the bill of exceptions, has carefully avoided any reference to the merits as to the circumstances under which he acted, or to the fact that there was no longer any system or rules by which abandoned or captured property could be seized, the same having been before vacated.

The Court must apply to this record the usual prescription in favor of the judgment below. And as neither the whole evidence is here, nor the whole charge is before the Court, nor anything whatsoever to show how the defendant was acting—nothing relating to the merits—the Court must decide upon the technical question raised in the record, as to the non-joinder of other parties, in the light of the legal presumption applying to such cases. So, judging by the record, there can, I think, be but one result—an affirmance of the judgment.

All of which is respectfully submitted,

T. D. LINCOLN,

*Of Counsel for Defendant in Error.*

*Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.* [*February*, 1873.]

# Supreme Court of United States,

## DECEMBER TERM, 1872.

*Flanders*

*135.*] *vs.*

*Tweed.*

**T. D. LINCOLN,**
*Of Counsel for Def't in Error.*

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# Supreme Court of United States,

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*Flanders*

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I have just seen the brief of the counsel in error, this 14th of February, and I make this short reply. I had before written a brief in this case, in order to meet the requirement of the late rules, which make it necessary that the defendant in error should write his brief before seeing that of the plaintiff in error, at least such counsel as live at a distance from Washington. I have anticipated nearly all that is necessary to say in reply to this brief, and refer to the former brief and the briefs in case No. 136.

The learned counsel insist that there was error in the proceedings below, for the reason that counsel fees and expenses were allowed by the jury in making up their verdict.

I have endeavored to show, in the brief heretofore printed, that these fees are proper items of recovery. See pages 31 to 37. That they are allowed in such a case at common law, and that they are and always have been deemed legitimate damages in

civil law, and were proper here, as these transactions were under the civil law.

I also endeavored to show that whether this be correct or not, that the plaintiff in error, not having objected to these items, or presented any question in reference to the same in the ways known to the law, could not raise this question in this Court.

There was no objection made to the proof of counsel fees—no charge requested in relation to it—no exception in reference to it.

All that the record shows is that it was one of the items allowed by the jury in making up the verdict. It is in the verdict.

In the motion for new trial, it is made one of the reasons why the Court should set aside the verdict, not that it was an improper item, but that it was not proved.

Thus, at the foot of the reasons for a new trial, is the following:

"That all of said verdict, except so far as it relates to the decline in cotton, is *unsupported by evidence, no evidence having been given to the jury in regard to insurance, clerks, and marshal's costs, or attorneys' fees, all that portion of said verdict being an act of legislation by the jury.*" Record, p. 13.

The Court will observe that even here it is not objected, that the item is an improper one, if proven. And from this record it is fair to assume that the counsel for defendant below admitted the item to be one for which a recovery was proper. It is not possible that there was no evidence of these items, for the jury has found definitely what they were, and the Court refused to set aside the verdict. And this appears after the verdict, and shows that the item itself was not objected to as an illegal one.

And can counsel lie by without objection to such an item, till after verdict, and then raise it in this way? It would be contrary to all the rules by which courts of error act.

And the reasons given for a new trial can not be considered by this Court on error. It presents no question for this Court to pass its judgment upon it. *Chambers* v. *Campbell*, 1 Conn. 430. See fomer brief, p. 29.

The learned counsel cites two cases to sustain their position. They are: *Arcambell* v. *Wiseman*, 3 Dall. 306; *Jennings* v. *Brig Perseverance* 3 Dall. 326.

These cases are not in point. The first was a case in chancery, where the whole evidence and the whole case is before the Court. And the second was one in admiralty, where the same is true. The whole evidence and the whole case is before the Court for the purposes of equity. There are no such rules as exist in cases at law, to raise questions for the action of a court setting in error.

The Court will find the authories direct in point, on pages 31 to 37, and especially those from Louisiana:

*Offut* v. *Edwards*, 9 Rob. (La.) 94.
*Littlejohn* v. *Wilcox*, 2 La. Ann. 620.
*Jones* v. *Doles*, 3 La. Ann. 589.
*Penny* v. *Taylor*, 5 La. Ann. 714.
*Norton* v. *Cammock*, 10 La. Ann. 10, 11.
*Gray* v. *Lane*, 11 La Ann. 392.
*Phelps* v. *Coggeshall*, 13 La. Ann. 441.
*Accessory Tr. Co.* v. *McFarren*, 13 La. Ann. 214, 215.
*Phillips* v. *Bonham*, 16 La. Ann. 387.
*Dickinson* v. *Maynard*, 20 La. Ann. 67.

This is the well-settled rule of the civil law.

In *Penny* v. *Taylor*, the Court say:

"The expense the plaintiff was put to for counsel fees, for the purpose of having the vessel released from the sequestration, and other expenses resulting therefrom, the defendants by their bond are clearly bound to reimburse to the plaintiff." 5 La. Ann. 714.

In the case of *Phelps* v. *Coggeshall*, the Court say:

"It being shown that the attachment wrongfully issued, the party whose property was improperly attached is entitled to recover the actual damages proven.

"He has shown that the services of an attorney, in dissolving the attachment, caused him an expense of one hundred dollars. This should be added to the sum awarded by the jury." 13 La. Ann. 441.

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"He has shown that the services of an attorney, in dissolving the attachment, caused him an expense of one hundred dollars. This should be added to the sum awarded by the jury." *Littlejohn* v. *Wilcox*. 2 Ann. 620; *Penny* v. *Taylor*, 5 Ann. 714.

This doctrine is spoken of in *Gray* v. *Lowe*, 11 La. Ann, 392, as well settled in Louisiana, in cases where a party has to resort to legal proceedings to obtain possession of property wrongfully withheld.

As to the matter of sequestration, I refer to my former brief and to my briefs in No. 136.

All of which is respectfully submitted.

T. D. LINCOLN,

*Of Counsel for Defendant in Error.*